UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

FEDERAL HOME LOAN BANK OF INDIANAPOLIS, Plaintiff, v. BANC OF AMERICA MORTGAGE SECURITIES, INC., ET AL., Defendants.	No. 10-cv-1463 WTL-MDL

SUPPLEMENTAL BRIEF OF UBS AND WELLS FARGO DEFENDANTS IN SUPPORT OF DEFENDANTS' JOINT OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

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Defendants UBS Securities LLC ("UBS") and Wells Fargo & Company, Wells Fargo Asset Securities Corporation, and Wells Fargo Bank, National Association (collectively, "Wells Fargo") (together with UBS, "Defendants") hereby fully join in Defendants' Joint Opposition to Plaintiff's Motion for Remand ("Joint Opposition"), and submit this supplemental brief in support of the Joint Opposition to the Motion for Remand ("Remand Mem." or the "Remand Motion") filed by Plaintiff Federal Home Loan Bank of Indianapolis ("Plaintiff" or "FHLB Indianapolis").

INTRODUCTION

FHLB Indianapolis's claims against UBS and Wells Fargo arise, in part, from residential mortgage-backed securities ("RMBS") containing mortgages originated by American Home Mortgages ("AHM") and IndyMac, F.S.B. ("IndyMac"). AHM and IndyMac owe indemnity obligations to Defendants. Both are in bankruptcy.[1] Plainly, the "resolution [of FHLB Indianapolis's claims] 'affects the amount of property available for distribution or the allocation of property among creditors.'" *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989) (internal citation omitted). As such, this case is "related to" a bankruptcy proceeding. *Id.*; *see also, e.g., Matter of Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987). This Court therefore has jurisdiction under 28 U.S.C. §§ 1334(b) and 1452(a).

[1] On July 11, 2008, the Federal Deposit Insurance Corporation was appointed receiver for IndyMac, FSB. On July 31, 2008, IndyMac Bancorp, Inc. ("IndyMac Bancorp"), the parent holding company of IndyMac, filed a voluntary petition for relief under Chapter 11 of the United States Code in the United States Bankruptcy Court for the Central District of California, *In re IndyMac Bancorp*, Case No. 08-21752-BB. *See also infra* note 6. On August 6, 2007, AHM filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, *In re Am. Home Mortg. Holdings, Inc.*, Case No. 07-11047, *et seq.*

ARGUMENT

Related-to-bankruptcy jurisdiction is proper here, as this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 1452(a).[2] A case is "related to" a bankruptcy proceeding if "its resolution 'affects the amount of property available for distribution or the allocation of property among creditors.'" *Home Ins. Co.*, 889 F.2d at 749; *see also Matter of Xonics, Inc.*, 813 F.2d at 131; *In re FedPak Sys., Inc.*, 80 F.3d 207, 213–14 (7th Cir. 1996).[3] "Courts generally have adopted an expansive view of the concept of 'relatedness,' and 'related to' jurisdiction is broadly interpreted." *Baxter Healthcare Corp.* v. *Hemex Liquidation Trust*, 132 B.R. 863, 866 (N.D. Ill. 1991); *see generally Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 (1995) ("[T]he 'related to' language of § 1334(b) must be read to give district courts . . . jurisdiction over more than simple proceedings involving the property of the debtor or the estate.") (internal citations and quotation marks omitted).

I. THIS ACTION HAS A DIRECT EFFECT ON PENDING BANKRUPTCY PROCEEDINGS.

The relationship between this action and the AHM and IndyMac bankruptcy actions is clear. The allegations against Defendants UBS and Wells Fargo arise, in part, from

[2] Plaintiff contends that Wells Fargo and UBS have failed to provide a statement in the removal papers pursuant to Rule 9027(a)(1) of the Federal Rules of Bankruptcy Procedure. (Remand Mem. at 26.) Plaintiff does not argue that this omission was a jurisdictional defect, and any such argument would be unavailing. *See In re Heinsohn*, 231 B.R. 48, 53 (E.D. Tenn. 1999) ("[T]he defendant's failure to include in the original notice of removal a statement that the proceeding is core or non-core is not fatal . . . . [T]he core/non-core statement is not an allegation of jurisdiction essential to removal."). At any rate, both Wells Fargo and UBS have filed corrections to their joinders in removal that include the Rule 9027(a)(1) statement. (ECF Nos. 140, 143.)

[3] Plaintiff asserts that the Seventh Circuit has rejected the "more liberal" bankruptcy related standard applied by other federal circuits. (*See* Remand Mem. at 28.) The Supreme Court, however, has stated the Seventh Circuit's test is only "slightly different" from the standard followed by several of its sister circuits. *See Celotex Corp.*, 514 U.S. 300, 308–09 n.6; *see also Megliola* v. *Maxwell*, 293 B.R. 443, 448 (N.D. Ill. 2003). Plaintiff also relies on *FedPak* for the proposition that the Seventh Circuit has "interpreted 'related to' jurisdiction narrowly out of respect for Article III." (Remand Mem. at 27.) In *FedPak*, the Seventh Circuit addressed the application of 28 U.S.C. § 157(c), which allows a non-Article III bankruptcy judge to hear non-core bankruptcy actions. 80 F.3d at 214. In this case, by contrast, Defendants have not asked for this action to be heard by a bankruptcy judge pursuant to 28 U.S.C. § 157(c). Thus, the concerns expressed in *FedPak* are inapplicable here.

RMBS containing mortgages originated by AHM or IndyMac. (Compl. ¶¶ 4–6.) These bankrupt entities made certain representations and warranties regarding the characteristics of the underlying mortgages, and they agreed in writing to indemnify, respectively, UBS or Wells Fargo against claims for any alleged breaches—including those alleged in Plaintiff's complaint. For instance, Plaintiff has brought federal securities and state law claims against Wells Fargo and UBS with respect to WFMBS 2007-10 1A10, an RMBS certificate backed by loans that were in part originated by AHM. (*Id.* ¶¶ 406, 422, 434, 449.)[4]

On November 16, 2010, Wells Fargo filed Amended Proofs of Claim in the United States Bankruptcy Court for the District of Delaware, *In re American Home Mortgage Holdings, Inc.*, Case No. 07-11047, *et seq.*, based on "contractual rights of indemnity and contribution pursuant to" purchase agreements covering WFMBS 2007-10 (among other RMBS). The Amended Proofs of Claim specifically included in the Original Claims "the various contractual, statutory, common law and/or other claims of indemnity, contribution and reimbursement against the Debtor for damages and costs that have already been incurred and will likely continue to be incurred" as a result of Plaintiff's filing of this action. (Adams Decl. Ex. A.)[5] Because UBS and Wells Fargo's indemnification claims will reduce the assets available to other creditors of these bankrupt entities, this case is "related to" their bankruptcies under § 1334.

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[4] Contrary to Plaintiff's assertion, Wells Fargo's Proofs of Claims were filed prior to the deadline for submission of such claims. (*See* Declaration of Jennifer Westerhaus Adams ("Adams Decl."), filed concurrently herewith, at Ex. A.)

[5] Likewise, Plaintiff has brought claims against UBS as an underwriter defendant with respect to RAST 2005-A11 2A1. (*Id.* ¶¶ 406, 422, 434, 449.) In that separate offering, the depositor, IndyMac MBS, Inc., purchased the mortgage loans in the mortgage pool from IndyMac pursuant to a pooling and servicing agreement. IndyMac MBS, Inc. was a subsidiary of IndyMac. On July 31, 2008, IndyMac Bancorp, Inc. ("IndyMac Bancorp"), the parent holding company of IndyMac, filed a voluntary petition for relief under Chapter 7 of the United States Code in the United States Bankruptcy Court for the Central District of California, *In re IndyMac Bancorp, Inc.*, Case No. 08-21752-BB. According to the offering documents, IndyMac MBS, Inc. "has agreed to indemnify [UBS] against, or make contributions to the underwriters with respect to, liabilities customarily indemnified against, including liabilities under the Securities Act of 1933." (Adams Decl. Ex. B at S-77–S-78.)

Plaintiff inaccurately contends that the indemnity claims are too speculative to establish "related to" bankruptcy jurisdiction. (Remand Mem. at 27–28.) This argument must fail because a contractual indemnity claim against a bankrupt entity reduces the amount of assets available to satisfy the claims of other creditors, "a result which *unquestionably* impacts upon the administration of the [bankrupt] estate." *Apex Inv. Assoc., Inc.* v. *TJX Cos.*, 121 B.R. 522, 525 (N.D. Ill. 1990) (emphasis added); *see also In re Resource Tech. Corp.*, No. 03-C-5785, 2004 WL 419918, at *4 (N.D. Ill. Feb. 13, 2004) (when a party "will seek indemnification from" a party in bankruptcy, the dispute is related to bankruptcy proceeding); *Stichting Pensioenfonds ABP* v. *Countrywide Fin. Corp.*, No. 10-cv-07275, slip op. at 5–8 (C.D. Cal. Dec. 29, 2010) (finding "related-to" jurisdiction where indemnification agreement with AHM made "clear that [its] obligation to defend . . . arose immediately upon the filing of this lawsuit")).[6] Indeed, every court to address this issue in recent RMBS litigation has held that materially indistinguishable indemnity claims do confer "related to" jurisdiction. *See, e.g.*, *Lone Star Fund V (U.S.), L.P.* v. *Barclays Bank PLC*, 594 F.3d 383, 386–87 (5th Cir. 2010); *Fed. Home Loan Bank of San Francisco* v. *Deutsche Bank Sec., Inc.*, No. 10-3039, 2010 WL 5394742, at *4 (N.D. Cal. Dec. 20, 2010); *New Jersey* v. *Fuld*, No. 09-1629, 2009 WL 1810356, at *3–4 (D.N.J. June 24, 2009); *Mass. Bricklayers & Masons Trust Funds* v. *Deutsche Alt-A Sec., Inc.*, 399 B.R. 119, 121, 123 (E.D.N.Y. 2009); *City of Ann Arbor Emps.' Ret. Sys.* v. *Citigroup Mortg. Loan Trust Inc.*,

[6] Plaintiff argues that "related to" bankruptcy jurisdiction cannot be premised on a potential indemnity claim presenting only some contingent impact on the bankruptcy estate. (Remand Mem. at 20 (citing *Kalamazoo Realty Venture Ltd. P'ship v. Blockbuster Entm't Corp.*, 249 B.R. 879, 884–85 (N.D. Ill), *In re Green*, 210 B.R. 556, 560 (Bankr. N.D. Ill. 1997), and *In re Schwinn Bicycle Co.*, 210 B.R. 747, 756 (Bankr. N.D. Ill. 1997).) *Kalamazoo, Green,* and *Schwinn* all involved circumstances in which another action had to be brought before indemnification rights arose, whereas here, the indemnification claims are already ripe for adjudication, because their indemnification rights "arose immediately upon the filing of this lawsuit." *Stichting Pensioenfonds*, slip op. at 8.

572 F. Supp. 2d 314, 318–19 (E.D.N.Y. 2008). Therefore, Defendants have established "related to" bankruptcy jurisdiction.[7]

II. THERE IS NO BASIS FOR EQUITABLE REMAND OR PERMISSIVE ABSTENTION.

Plaintiff contends that, even if the Court has "related to" jurisdiction, it should remand the action on equitable grounds under 28 U.S.C. § 1452 or exercise permissive abstention under 28 U.S.C. § 1334(c)(1). (Remand Mem. at 27, 29–31.) Neither approach is appropriate here. Abstention is "an extraordinary and narrow exception" to the duty of federal courts to adjudicate disputes properly before them. *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976); *see also Trailer Marine Transp. Corp*. v. *Rivera-Vazquez*, 931 F.2d 961, 961 (1st Cir. 1991) ("[A]bstention from the exercise of federal jurisdiction is the exception, not the rule . . . .") (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp*., 460 U.S. 1, 14 (1983)).

In deciding whether to abstain or remand, courts evaluate certain equitable considerations "which implicate the concerns of the interest of justice and comity referred to in [§ 1334(c)]." *In re Gianakas*, 75 B.R. 272, 275 (N.D. Ill. 1986). For example, courts within the Seventh Circuit consider whether the "case involves questions of state law better addressed by a state court," the "expertise of the court where action originated," the risk of "duplication" or "uneconomical use of judicial resources," the "possibility of an inconsistent result," and the "effect of remand on the administration of the bankruptcy estate," *Allen County Bank & Trust* v.

[7] Plaintiff opposes removal based on its own self-serving estimation that, "if the indemnity claims could be asserted, there would be zero recovery on them and they would therefore have zero effect on the subject cases." (Remand Mem. at 26.) Contrary to Plaintiff's argument, there is no requirement that a court assess the "material value" or "economic effect" of the indemnity claims before determining whether there is "related to" jurisdiction. Rather, the Seventh Circuit upholds the exercise of such jurisdiction whenever the dispute "affects the amount of property for distribution . . . or the allocation of property among creditors." *In re FedPak Sys.*, 80 F.3d at 213.

Valmatic Int'l Corp., 51 B.R. 578, 582 (N.D. Ind. 1985). The standards for discretionary abstention and equitable remand are similar. *See Klohr* v. *Martin & Bayley, Inc.*, No. 05-456, 2006 WL 1207141, at *4 n.1 (S.D. Ill. May 3, 2006).

All of the equitable factors weigh heavily against remand or abstention. As established above, Wells Fargo and UBS have substantial indemnity claims against the estates of the bankrupt entities that have already accrued, and that will only increase in amount as this litigation progresses. *See, e.g.*, *In re Import & Mini Car Parts*, No. 96-2017, 1996 WL 554450, at *2 (7th Cir. Sept. 27, 1996).

Plaintiff argues for equitable remand because the Indiana state court "is presumptively the preferred forum to adjudicate claims arising under the Indiana Uniform Securities Act and Indiana common law of negligence." (Remand Mem. at 30.) Yet, Plaintiff has alleged both federal and state law claims here. (*See* Compl. ¶¶ 434–61.) Plaintiff provides no plausible explanation for why Indiana state courts are better equipped to adjudicate these federal claims. Moreover, there is "no need" for a court's exercise of permissive abstention in the presence of a state-law issue where the "state law issue is not unsettled." *See In re Chicago, M. & St. P. & Pac. R.R.*, 6 F.3d 1184, 1189 n.7 (7th Cir. 1993). Plaintiff points to no unsettled issue of state law compelling abstention. To the contrary, the provision of the Indiana Uniform Securities Act at issue here is "identical in all material respects to the federal law." *Rousseff* v. *Dean Witter & Co., Inc.*, 453 F. Supp. 774, 779 (N.D. Ind. 1978). And federal courts routinely construe this Act. *See, e.g.*, *Perry* v. *Eastman Kodak Co.*, No. 91-2192, 1992 WL 103695, at *7

(7th Cir. 1992); *LaRosa Bldg. Corp*. v. *Equitable Life Assur. Soc. of U.S.*, 542 F.2d 990, 990–92 (7th Cir. 1976).[8]

Plaintiff also argues that it will incur some additional litigation burden if the Court were to exercise jurisdiction over Wells Fargo and UBS but remand the remaining claims. (Remand Mem. at 30–31.) But the possibility that FHLB Indianapolis may have to pursue its claims in different courts does not support equitable remand. This risk is simply the natural result of Plaintiff's decision to assert factually distinct claims against a large number of unrelated defendants in a single complaint. In any event, it is not necessary for the Court to remand some claims but not others. Removal is proper if *any* claims are bankruptcy related. *See Celotex*, 514 U.S. at 307; 28 U.S.C. § 1441(c). In this case, Plaintiff made the deliberate choice to join all Defendants in a single action, opening the door to the possibility that the entire action might be removed because claims against certain defendants were related to bankruptcy.[9]

Nor do considerations of comity weigh in favor of remand. Comity is grounded in a state's interest in developing and applying its law to its own citizens. *See Good* v. *Kvaerner U.S. Inc.*, No. 03-CV-0476, 2003 WL 21755782, at *4–5 (S.D. Ind. July 25, 2003). If the Court were to find that Plaintiff is a citizen of Indiana, then it could exercise diversity jurisdiction over this action, and need not consider "related to" bankruptcy jurisdiction at all. If, however, the Court were to conclude that it cannot exercise diversity jurisdiction, it would do so based on a determination that Plaintiff is not a citizen of Indiana. In that case, Indiana would have no interest in this lawsuit, and comity would not support remand.

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[8] It is also questionable whether Indiana law applies to this action, given that none of the parties is alleged to be a citizen of Indiana and the underlying RMBS at issue have no particular connection with Indiana.

[9] Plaintiff relies on *FHLB Seattle*, in which the Court found that it had related-to-bankruptcy jurisdiction but equitably remanded based "largely on comity grounds." (Remand Mem. at 31.) *FHLB Seattle*, however, differed in that the plaintiff brought separate actions against numerous defendants. *See Fed. Home Loan Bank of Seattle* v. *Deutsche Bank Sec., Inc.*, No. C10-0140, --- F. Supp. 2d ---, 2010 WL 3512503 at *1, n.1 (W.D. Wash. Sept. 1, 2010). In some of the multiple lawsuits the Court had "related to" bankruptcy jurisdiction, while in others it did not. *Id.* at *7. Accordingly, if the court had not remanded, some of the actions would have been litigated in state court and some of the actions would have been litigated in federal court. Here, Plaintiff has brought a single action against all Defendants. If bankruptcy-related jurisdiction exists, the entire action properly may be removed.

III. THERE IS NO BASIS FOR MANDATORY ABSTENTION.

Plaintiff also erroneously contends that the Court must remand this action pursuant to the mandatory abstention provision in 28 U.S.C. § 1334(c)(2). Where federal jurisdiction exists, as here, the party seeking abstention has the burden of establishing that abstention is appropriate and that all statutory requirements have been satisfied. *See Klohr*, 2006 WL 1207141, at *1–4. Plaintiff has failed to do so.

First, § 1334(c)(2) does not apply here at all, because this action *could* "have been commenced in a court of the United States absent" related-to jurisdiction. 28 U.S.C. § 1334(c)(2). As set forth above, jurisdiction is proper based on the express language in Plaintiff's chartering statute and on diversity grounds. Second, Plaintiff cannot establish that an action has been "commenced" in a state court that requires deference. *See id.* The only "state" action plaintiff identifies in support of this requirement is this one, which it initiated in state court. (Remand Mem. at 32.) This argument, however, is tautological: once this matter was removed, the state court action was extinguished and plaintiff cannot point to it to satisfy the requirement that a parallel state court action remains pending. *See In re Cedar Funding, Inc.*, 419 B.R. 807, 820 (B.A.P. 9th Cir. 2009) (holding that mandatory and discretionary abstention provisions "are inapplicable to removed proceedings, since a successful removal effectively extinguishes the parallel proceeding in state court"); *accord In re Lazar*, 237 F.3d 967, 981–82 (9th Cir. 2001). If Plaintiff's argument were correct, then 28 U.S.C. § 1452, the bankruptcy-removal statute, would essentially be rendered a dead-letter for "related-to" cases, because mandatory abstention always would be appropriate in such cases. Third, Plaintiff has failed to establish that this action can be timely adjudicated in the Marion County Superior Court. *See*

28 U.S.C. § 1334(c)(2). Indeed, Plaintiff does nothing more than "respectfully submit" that it can be timely adjudicated there. (Remand Mem. at 32.) This "mere assertion" is insufficient. *Eaton* v. *Taskin*, No. 07-3056, 2007 WL 2700554, at *4 (C.D. Ill. July 20, 2007) (denying remand based on mandatory abstention where party seeking remand failed to "make a showing that this action can be timely adjudicated in state court" and "mere assertion alone is not enough"); *Georgou* v. *Fritzshall*, 157 B.R. 847, 851 (N.D. Ill. 1993) (same).

CONCLUSION

For the foregoing reasons, as well as for those reasons in the Joint Opposition, UBS and Wells Fargo respectfully request that the Court deny the Remand Motion in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the registered participants as identified on the Notice of Electronic Filing as of this date.

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